



Linda S. Adams  
Secretary for  
Environmental Protection

## Department of Toxic Substances Control

Maureen F. Gorsen, Director  
Certified Unified Program Agency  
Imperial Hazardous Materials/Waste Unit  
301 Heber Avenue  
Calexico, California 92231



Arnold Schwarzenegger  
Governor

March 9, 2009

CERTIFIED MAIL: 7007 1490 0001 4756 9093

Mr. Craig G. Robitaille  
President/CEO  
AccuChem Conversion, Inc.  
13226 Nelson Avenue  
City of Industry, California 91746

HEARING DECISION: ACCU CHEM CONVERSION INC, 605 NORTH 3<sup>rd</sup> STREET, EL CENTRO (IMPERIAL COUNTY) EPA ID NUMBER: CAL000248596

Dear Mr. Robitaille:

The California Environmental Protection Agency, Department of Toxic Substances Control, Imperial County Certified Unified Program Agency (DTSC Imperial CUPA), has reached a decision in the dispute resolution hearing for Accu Chem Conversion Inc. (ACC) located at 605 North 3<sup>rd</sup> Street, in the City of El Centro, in Imperial County California. Please find the Hearing Decision enclosed.

On or around September 22, 2008, ACC submitted a request to commence a dispute resolution process as provided by the California Accidental Release Program (Cal/ARP) regulations. A hearing was held on December 15, 2008 as part of the dispute resolution process. At the meeting, you presented documentation to the DTSC Imperial CUPA. This Hearing Decision is based, in part, upon the documentation you presented at that hearing.

If you have any questions regarding this letter, or if you wish to meet with the DTSC Imperial CUPA to discuss any questions or concern you have with the Hearing Decision, please call me at (760) 768-7104.

Mr. Craig G. Robitaille  
March 9, 2009  
Page 2

Sincerely,

A handwritten signature in dark ink, appearing to read "Roger Vintze". The signature is fluid and cursive, with the first name "Roger" and last name "Vintze" clearly distinguishable.

Roger Vintze  
Performance Manager  
Dept. of Toxic Substances Control  
Certified Unified Program Agency  
Imperial Hazardous Materials/Waste Unit

cc: Mr. Phil Zlaket  
Director of Manufacturing and Corporate Compliance  
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City of Industry, California 91746  
(Via email)

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(Via email)

1 DTSC Imperial County CUPA  
2 Street Address: 301 Heber Avenue  
3 Mailing Address: 301 Heber Avenue  
4 City and Zip Code: Calexico, CA 92231

5 **HEARING DECISION**

7 **ACCU CHEM CONVERSION, INC.**

8 **Petitioner**

) **Hearing Date: December 15, 2008**  
) **DTSC Imperial CUPA**  
) **Calexico, CA**

) **Hearing Officer: Roger Vintze**  
)  
)  
)  
)

13  
14 **BACKGROUND AND INTRODUCTION**

15 Operations at ACCU CHEM Conversion, Inc. involve the receipt of rail cars that contain 36.9%  
16 by weight hydrogen chloride. The material is transferred into mobile units and delivered to the  
17 final customer. The DTSC Imperial County CUPA made a determination that this operation was  
18 required to comply with the California Accidental Release Program (hereafter CAL-ARP).

19  
20 ACCU CHEM Conversion, Inc. submitted a request on or around September 22, 2008 to  
21 commence a dispute resolution process as provided for by the CAL-ARP regulations. A hearing  
22 was held on December 15, 2008 as part of the dispute resolution process.

23  
24 The two main contentions presented by ACCU CHEM Conversion, Inc are that 36.9% by weight  
25 hydrogen chloride with the remainder as water is not regulated under the CAL-ARP because it is

1 below the threshold of 37% by weight hydrogen chloride as listed in federal regulations; and that  
2 the operations should be excluded as a stationary source because they should be considered as  
3 transportation functions.

4  
5 Present at the hearing was Mr. Craig Robitaille, President and CEO of ACCU CHEM  
6 Conversion, Inc., Frank Molloy, Esq. counsel on behalf of ACCU CHEM Conversion, Inc., Ryan  
7 Atencio, Hazardous Substances Scientist, DTSC Imperial County CUPA, and Robert Sullivan,  
8 Esq. Staff Counsel DTSC. The proceedings were conducted by Roger Vintze, Supervising  
9 Hazardous Substances Scientist, DTSC Imperial County CUPA.

10  
11 Documents submitted by ACCU CHEM Conversion, Inc at the hearing included copies of  
12 various regulations, PHMSA interpretation letters, shipping papers, contracts, and descriptions of  
13 processes and procedures. A complete listing of documents is included as Attachment A.

14  
15 Petitioner ACCU CHEM Conversions, Inc. requested the following issues be decided by the  
16 DTSC Imperial County CUPA.

17  
18 **ISSUE NUMBER ONE**

19 The issue is whether 36.9 percent (%) hydrochloric acid is regulated under the California  
20 Accidental Release Program (CAL-ARP).

21  
22 **ISSUE NUMBER TWO**

23 The issue is whether the operations involving hydrochloric acid at ACCU CHEM are a stationary  
24 source such that the activity should be regulated under CAL-ARP.

1 ISSUE NUMBER ONE

2 REGULATION OF HYDROCHLORIC ACID

3 The issue is whether 36.9 % hydrochloric acid is regulated under California Accidental Release  
4 Program (hereafter referred to as CAL-ARP).

5  
6 THE LAW

7 In the State of California, the "Risk Management Plan Program" is the California Accidental  
8 Release Prevention Program, or CAL-ARP. CAL-ARP is the Federal Risk Management Plan  
9 Program with additional state requirements, including an additional list of regulated substances  
10 and thresholds. The authorizing provisions for this program are found in California Health and  
11 Safety Code sections 25531 to 25543.3. The regulations for the program are contained in  
12 California Code of Regulations, title 19, sections 2735.1 to 2785.1.

13 .  
14 Hydrogen chloride (CAS #7647-01-0) is listed as "hydrogen chloride (gas only)" as a Table 3  
15 chemical with threshold designation of 500 pounds per process in California Code of  
16 Regulations, title 19, section 2770.5. A listing as a Table 3 substance designates the chemical as  
17 regulated under the CAL-ARP state program rather than the CAL-ARP federal program  
18 requirements, which is frequently referred to as the federal RMP.

19  
20 For purposes of the federal RMP, hydrogen chloride (hydrochloric acid) concentrations of less  
21 than 37%, Code of Federal Regulations, title 40, section 68.130, table of toxics (which is  
22 identical to California Code of Regulations, title 19, section 2770.5, Table 1), are not subject to  
23 the RMP.

1 Under the California Code of Regulations, title 19, section 2770.2 subsection (b)(1)(A), a  
2 regulated substance in a mixture at 1% or greater concentration is counted towards the threshold  
3 quantity unless it can be shown that under process conditions, the solution has a vapor pressure  
4 of less than 10 mm Hg. (Cal. Code Regs., tit. 19, § 2770.2, subsection (b)(1)(B).)

### 6 ANALYSIS

7 There is ample history for considering hydrogen chloride/hydrochloric acid for a risk  
8 management program because of the potential for dispersion of hydrogen chloride into the  
9 environment. The terms hydrogen chloride and hydrochloric acid are frequently used  
10 interchangeably, therefore a few introductory comments on the chemistry of the substance are  
11 helpful.

12  
13 Pure hydrogen chloride gas exists in the absence of water and is referred to as anhydrous  
14 hydrogen chloride. Hydrogen chloride gas is readily absorbed by water. Therefore, gaseous  
15 hydrogen chloride will partition into atmospheric water such as fog, mist, and cloud water (the  
16 very small aerosol droplets of water of which clouds are composed). A mixture of hydrogen  
17 chloride gas and water is typically referred to as hydrochloric acid.

18  
19 Hydrogen chloride and water form a constant boiling mixture (azeotropic mixture); at  
20 atmospheric pressure the mixture boils at 108.584 °C and has a composition of 20.2 weight %  
21 hydrogen chloride. As the pressure increases, the boiling point increases and the azeotropic  
22 composition decreases. At hydrogen chloride concentrations below the azeotropic concentration,  
23 the vapor has a higher water concentration than the solution with which it is in equilibrium. At  
24 concentrations higher than the azeotropic concentration, the vapor is enriched in hydrogen  
25 chloride relative to the liquid. Above 35 weight % hydrogen chloride, the vapor has very little

1 water content. Typical reagent grade hydrochloric acid solutions are a mixture of 36% to 38% by  
2 weight hydrogen chloride with the remainder as water. In this case we are addressing a mixture  
3 of 36.9% hydrogen chloride by weight with the remainder as water.

#### 4 5 FEDERAL RMP

6 In this case we are addressing a concentration of hydrogen chloride that is near the federal  
7 threshold level, therefore it is instructive to review the listing of hydrogen chloride/hydrochloric  
8 under the federal accidental release program as discussed in the May 22, 1997 Federal Register.

9  
10 In considering the statutory criteria for listing regulated substances discussed above, EPA  
11 selected commercially produced acutely toxic and volatile substances mostly from the list  
12 of extremely hazardous substances (EHSs) under section 302 of the Emergency Planning  
and Community Right-to-Know Act (EPCRA). EPA chose volatile substances because  
they are more likely to become airborne and impact the public. (62 Fed. Reg.27994 (May  
22, 1997).)

13  
14 In the initial listing of hydrochloric acid for regulation under the federal risk management  
15 program, EPA proposed listing solutions of 30% by weight of greater hydrogen chloride.  
16 The American Petroleum Institute (API), the Institute of Makers of Explosives (IME),  
and the General Electric Company (GE) filed petitions for judicial review of the List Rule  
(American Petroleum Institute v. EPA, No. 94-1273 (D.C. Cir.) and consolidated cases).  
(62 Fed. Reg.27994 (May 22, 1997).)

17  
18 The GE petition for review raised issues regarding EPA's listing criteria under the List  
19 Rule, the listing of certain substances in the List Rule, the setting of threshold quantities  
20 for certain substances in particular and all regulated toxic substances generally, and the  
21 petition process for adding and deleting regulated substances to the list. GE identified as  
22 "[t]he crux of the dispute \* \* \* the legality and propriety of including solutions of  
23 hydrochloric acid at 30% or greater on the list of regulated substances," and challenged  
24 the adequacy of the administrative record support for both the listing and the 15,000  
25 pound threshold for such solutions (see GE Status Report of January 27, 1997, page 2,  
and the settlement agreement between GE and EPA, page 1, both of which are in the  
docket for today's proposed rule). While neither GE nor EPA conceded the correctness of  
the opposing party's position on any of the issues raised by GE, both parties recognized  
that there were substantial and material issues regarding the support in the administrative  
record for the listing of concentrations of hydrochloric acid up to 37% hydrogen chloride.  
(62 Fed. Reg.27994 (May 22, 1997).)

1 In the above-described litigation, GE raised substantial concerns regarding whether the  
2 administrative record for the List Rule supports the listing of Hydrochloric Acid solutions  
3 at 30% hydrogen chloride concentrations. Among other issues, GE has questioned  
4 whether the listing criteria EPA used to list such solutions appropriately characterize  
5 these solutions' potential magnitude of human exposure and has challenged the  
6 methodology used to assign such solutions a 15,000 pound threshold. As discussed  
7 below, EPA believes that the concerns discussed above warrant vacating the listing of  
8 hydrochloric acid solutions of less than 37% (i.e., from 30% inclusive, up to but not  
9 including 37%).(62 Fed. Reg.27994 (May 22, 1997).)

10 The result of the settlement between EPA and the parties relative to hydrochloric acid was the  
11 listing criteria for hydrochloric acid was revised to 37% by weight or greater of hydrogen  
12 chloride.

13 EPA subsequently explained the impact of providing a concentration by weight listing for  
14 chemical substances in the August 25, 1997 Federal Register:

15 For certain chemicals commonly handled in solution with water, EPA established  
16 minimum concentrations for mixtures with water (40 CFR 68.130, Tables 1 and 2). These  
17 chemicals and their minimum concentrations are ammonia (20% or greater), hydrogen  
18 chloride / hydrochloric acid (37% or greater), hydrogen fluoride / hydrofluoric acid (50%  
19 or greater), and nitric acid (80% or greater). EPA also included separate listings for  
20 anhydrous forms of ammonia and hydrogen chloride. (62 Fed. Reg. 45135 (Aug 25,  
21 1997).)

22 Some confusion has arisen over whether the one percent default mixture rule would apply  
23 to mixtures containing aqueous solutions of ammonia, hydrochloric acid, hydrofluoric  
24 acid, or nitric acid. When EPA included minimum concentrations for these chemicals on  
25 the tables listing regulated substances, EPA intended to supersede the 1% general default  
rule for mixtures containing regulated toxic substances and to provide a simpler method  
for threshold determination than the partial pressure method. As EPA stated in the  
preamble to the List Rule, "[t]hese chemicals, in mixtures or solutions with  
concentrations below the specified cut-off, will not have to be considered in determining  
whether a threshold quantity is present" (59 FR 4478, 4488, January 31, 1994).  
Therefore, EPA wishes to clarify that the one percent mixture rule established in 40 CFR  
68.115(b)(1) does not apply to aqueous solutions or mixtures containing ammonia,  
hydrochloric acid, hydrofluoric acid or nitric acid for purposes of determining whether  
more than a threshold quantity is present at a stationary source. For such mixtures, the

1 quantity of regulated substance in the mixture must be considered only if the  
2 concentration of the regulated substance in the total mixture equals or exceeds the  
3 specified minimum concentration in the list rule. (62 Fed. Reg. 45135 (Aug 25, 1997).)

4 At the same time, EPA clarified the method of calculating the threshold quantity for those  
5 substances commonly associated with handling in water.

6  
7 Another question that has been asked about how to calculate the quantity of a regulated  
8 substance for a listed solution concerns whether the source must include the entire weight  
9 of the solution towards the threshold. For example, some have asked whether a 50,000  
10 pound solution that is 28 percent (28%) ammonia (14,000 pounds of ammonia contained  
11 in solution) would exceed the threshold for aqueous ammonia, which is 20,000 pounds.  
Some have read the specific listing of these solutions to mean that the entire solution is  
the regulated substance, thus requiring threshold calculations to be based on the entire  
solution. (62 Fed. Reg. 45135 (Aug 25, 1997).)

12 In providing concentration cutoffs for specific chemicals, EPA did not intend to treat the  
13 entire listed solution as a regulated substance. Rather, EPA intended simply to establish  
14 an alternative method for calculating minimum concentrations for substances that  
15 themselves are listed. The Agency's intent can be inferred from the location of the  
16 discussion of the concentration cut-offs in the "threshold determination" section of the  
17 List Rule preamble rather than in the discussion of the listing for toxic chemicals  
18 (compare 59 FR 4481-85 with 59 FR 4488). Furthermore, the citation in Tables 1 and 2  
19 to the Chemical Abstract Service (CAS) number refers to the regulated substance  
20 contained in the solution rather than the entire solution. However, the Agency has not  
21 been consistent in expressing this interpretation since promulgation of the List Rule. For  
22 example, in the "Risk Management Plan Rule: Summary and Response to Comments"  
23 ("RMP/RTC") EPA stated, "[i]f the regulated substance is listed as a solution \* \* \*, then  
24 the entire weight of the solution is used" (page 28-104). This incorrect expression of  
25 EPA's interpretation appears to be isolated and was not in the context of the development  
of the List Rule. The action announced today reaffirms the Agency's position taken in the  
List Rule context: the threshold quantities for solutions at and above the concentrations  
stated in the List Rule apply only to the quantity of the regulated toxic substance (listed in  
Tables 1 and 2 of 40 CFR 68.130) in the solution and do not include the water content of  
the solution. Thus, in the ammonia solution example discussed above, the threshold for  
aqueous ammonia would not be exceeded because the ammonia content of the 50,000  
pound solution would be 14,000 pounds (28% of 50,000), while the relevant threshold  
would be 20,000 pounds of ammonia. (62 Fed. Reg. 45135 (Aug 25, 1997).)

1 The Federal RMP program is concerned with the potential for a chemical substance to become  
2 dispersed in the environment and impact public health and the environment. The potential for  
3 dispersion is seen by the difference in threshold listings for anhydrous hydrogen chloride (5000  
4 pounds) and for mixtures or solutions of 37% by weight or greater hydrogen chloride (15,000  
5 pounds) because at higher concentration the potential is greater for the release of hydrogen  
6 chloride. The DTSC Imperial County CUPA is also concerned with the potential for dispersal of  
7 hydrogen chloride and the impact of a release on public health and the environment.

8  
9 As CAL-ARP is the Federal Risk Management Plan Program with additional state requirements,  
10 including an additional list of regulated substances and thresholds and the concentration of  
11 36.9% by weight hydrogen chloride with the remainder as water is below the 37% federal  
12 threshold listing; the 1% rule is not superseded for the additional state list of regulated  
13 substances and thresholds.

#### 14 15 **CONCLUSION ON REGULATION OF HYDROCHLORIC ACID**

16 Applying the above principles to the California Accidental Release Program, we note that  
17 Hydrogen chloride (CAS #7647-01-0) is listed as "hydrogen chloride (gas only)" as a Table 3  
18 chemical with a threshold designation of 500 pounds per process in California Code of  
19 Regulations, title 19, section 2770.5. A listing as a Table 3 substance designates the chemical as  
20 regulated under the CAL-ARP state program rather than the CAL-ARP federal program  
21 requirements, frequently referred to as the federal RMP. Because the listing for hydrogen  
22 chloride does not contain a concentration listing, the 1% rule for mixtures and solutions would  
23 apply. (Cal. Code Regs., tit. 19, § 2770.2, subsection (b)(1)(A).)

1 In this case we have a mixture or solution of 36.9% by weight hydrogen chloride, so we apply  
2 the 1% rule as the material is hydrogen chloride gas partitioned into water. During the December  
3 15 hearing the parties agreed a reasonable approximation of the weight of hydrogen chloride in a  
4 single railcar would be 50,000 pounds assuming a density of 8 pounds per gallon. Sixteen  
5 thousand (16,000) gallons of the solution would weigh approximately 128,000 pounds with  
6 36.9% of this as hydrogen chloride, or about 50,000 pounds. The CAL-ARP threshold, per  
7 California Code of Regulations, title 19, section 2770.5, Table 3, is 500 pounds per process.  
8 Based upon the quantity of hydrogen chloride exceeding the threshold quantity, the DTSC  
9 Imperial County has made the determination under California Health and Safety Code section  
10 25534 that the mixture or solution will be regulated under CAL-ARP if in a covered process.

11  
12 The subsequent sections of this document address whether the actual handling of the hydrogen  
13 chloride is subject to CAL-ARP.

## 14 15 ISSUE NUMBER TWO

### 16 STATIONARY SOURCE

17 The issue is whether the operations involving hydrochloric acid at ACCU CHEM Conversion,  
18 Inc. are a stationary source such that the activity should be regulated under CAL-ARP.

## 19 20 THE LAW

21 The definition of a stationary source is found in California Code of Regulations, title 19, section  
22 2735.3, subsection (uu).

23 ““Stationary source” means any buildings, structures, equipment, installations, or  
24 substance emitting stationary activities which belong to the same industrial group, which  
25 are located on one or more contiguous properties, which are under the control of the same  
person (or persons under common control), and from which an accidental release may  
occur. The term stationary source does not apply to transportation, including storage

1 incident to transportation, of any regulated substance or any other extremely hazardous  
2 substance under the provisions of this chapter. A stationary source includes transportation  
3 containers used for storage not incident to transportation and transportation containers  
4 connected to equipment at a stationary source for loading or unloading. Transportation  
5 includes, but is not limited to, transportation subject to oversight or regulations under Part  
6 192, 193, or 195 of Title 49 of CFR, or a state natural gas or hazardous liquid program  
7 for which the state has in effect a certification to DOT under Section 60105 of Title 49 of  
8 USC. A stationary source does not include naturally occurring hydrocarbon reservoirs.  
9 Properties shall not be considered contiguous solely because of a railroad or pipeline  
10 right-of-way."

## 11 ANALYSIS

12 The contention of ACCU CHEM Conversion, Inc. is that the operations at the facility should be  
13 excluded as a stationary source because the activities conducted at the site are a specific  
14 transportation activity defined as transloading. If the activity qualifies as transloading, then the  
15 operations would be regulated under the Hazardous Materials Regulations found in Title 49 of  
16 the Code of Federal Regulations (hereafter HMR) and excluded as a stationary source.  
17 Therefore, a review of transloading requirements is warranted.

### 18 **I. Transloading**

19 Transloading was introduced as a new term by the U.S. Department of Transportation, Pipeline  
20 and Hazardous Materials Safety Administration (hereafter PHMSA) in the October 30, 2003  
21 Federal Register.

22 "We are also defining a new term--"transloading"--to mean the transfer of a hazardous  
23 material from one HMR-authorized bulk packaging to another for purposes of continuing  
24 the movement of the hazardous material in commerce." (68 Fed. Reg. 61919 (Oct 30,  
25 2003).)

26 In the Federal Register published on April 15, 2005, the PHMSA provided an additional  
27 explanation of transloading.

1 The October 30, 2003 final rule defined a new term--"transloading." Transloading was  
2 defined as the transfer of a hazardous material at an intermodal transfer facility from one  
3 bulk packaging to another for purposes of continuing the movement of the hazardous  
4 material in commerce. In the October 30, 2003 final rule, transloading is identified as  
5 both a pre-transportation and a transportation function. A number of appellants expressed  
6 concern that the final rule's treatment of "transloading" was inconsistent and could lead  
7 to confusion as to whether storage of hazardous materials at a transloading facility is  
8 considered storage incidental to movement and subject to HMR requirements. "HM-223  
9 is inconsistent in its treatment of transloading \* \* \* [PHMSA should] clarify transloading  
10 as a transportation function. The distinction between transportation and pre-transportation  
11 functions is particularly important with respect to storage issues since storage incidental  
12 to transportation is regulated by [PHMSA]." (Akzo) Another appellant notes that  
13 "designating transloading as a pre-transportation function would be inconsistent with  
14 [PHMSA]'s approach to other intermodal facilities. (70 Fed. Reg. 20020 (April 15,  
15 2005).)

16 \* \* \* The similarities between transloading facilities and other intermodal facilities are  
17 apparent. In both cases, the facilities typically are carrier owned but operated by  
18 contractors or licensees pursuant to agreements with railroads. In both cases, the  
19 materials being transported are in the midst of the transportation process, with origin and  
20 destination points at different locations." (AAR) One appellant suggests that we add to  
21 the definition of "storage incidental to movement" an indication that "storage incidental  
22 to movement includes storage of transport vehicles and packages at transloading  
23 facilities." (IME) (70 Fed. Reg. 20020 (April 15, 2005).)

24 We agree with the appellants that storage of hazardous materials at transloading facilities  
25 is storage incidental to movement and subject to regulations applicable to such storage  
under the HMR. As one appellant notes, in 1995 and 2001, we found that Federal  
hazardous materials transportation law preempts state requirements prohibiting  
transloading operations in New York and Missouri (December 6, 1995, 60 FR 62527; and  
July 6, 2001, 66 FR 37089). An explicit determination in the HMR that storage at  
transloading facilities is considered storage incidental to movement for purposes of the  
HMR is, therefore, consistent with previously published administrative determinations on  
the issue. (70 Fed. Reg. 20020 (April 15, 2005).)

Appellants also ask us to consider revising the definition of "transloading" to cover  
transloading operations that take place at facilities other than intermodal transfer  
facilities. "[PHMSA should] remove the words 'at an intermodal facility' from its  
definition of transloading. Transloading does occur at consignee facilities. \* \* \* It is safer  
and more efficient to perform this transloading at a plant site than to transport these  
packages to an intermodal facility." (Akzo Nobel) We agree that the location at which  
transloading occurs should not dictate whether the operation is regulated as a  
transportation function and are modifying the definition in this final rule.

1 Therefore, the Akzo, AAR, DuPont, IME, and Norfolk Southern appeals related to the  
2 definition of transloading as a transportation function are granted. In this final rule, we  
3 are amending the following provisions of the October 30, 2003 final rule:

4 1. In Sec. 171.1, we are deleting paragraph (b)(4), which defined "transloading" as a  
5 pre-transportation function. We agree with appellants that transloading is a  
6 transportation function.

7 2. In Sec. 171.1, we are revising paragraph (c)(4) to indicate that "storage incidental  
8 to movement" includes storage at the destination indicated on a shipping document if  
9 the original shipping document includes information that the shipment is a through-  
10 shipment to an identified final destination. For example, a shipping paper prepared by  
11 the person offering a hazardous material for transportation in commerce may show the  
12 shipment destination as a transloading facility; provided that the shipping paper or  
13 other documentation includes information that the shipment is a through-shipment and  
14 identifies the final destination or destinations of the hazardous material, storage at the  
15 facility is "storage incidental to movement" and subject to regulation under the HMR.  
16 Note that such storage must be of the hazardous material in its original packaging (i.e.,  
17 the rail tank car) or its transloaded packaging (i.e., a cargo tank motor vehicle) in order  
18 to be considered "storage incidental to movement." Note also that storage of a  
19 hazardous material after delivery to its final destination is not "storage incidental to  
20 movement" and not subject to regulation under the HMR.

21 3. In Sec. 171.8, we are revising the definition of "pre- transportation function" to  
22 remove transloading operations. We are also revising the definition of "storage  
23 incidental to movement" to include storage of packaged hazardous materials at  
24 intermediate destinations provided the shipping documentation indicates that the  
25 shipment is a through-shipment and includes the final destination or destinations of the  
hazardous material.

4. In Sec. 171.8, we are revising the definition of "transloading" by removing the  
phrase "at an intermodal transfer facility" to clarify that transloading is regulated  
under the HMR irrespective of the location at which the operation occurs. We are also  
clarifying in the revised definition that transloading when performed by any person is  
regulated under the HMR. (70 Fed. Reg. 20020 (April 15, 2005).)

Summarizing the above requirements reveals that transloading is the transfer of material from  
one bulk packaging to another for the purpose of continuing the movement of the material in  
transportation to a through-shipment destination as designated on the shipping papers. Therefore  
it is important to review the shipping papers for the shipments handled at this facility.

## II. Material Transfer and Transloading

In the explanations in October 30, 2003 Federal Register, PHMSA provided a description of material transfer from one packaging to another that would qualify as transloading.

“Note that, for purposes of the HMR, “transloading” does not include operations that involve the transfer of a hazardous material from one packaging to another for purposes of mixing, blending, or otherwise altering the hazardous materials. Further, “transloading” does not include movement of product to or from a bulk storage tank. For purposes of the HMR, “transloading” is a pure transfer from one bulk packaging to another at an intermodal transfer facility; ““(68 Fed. Reg. 61919 (Oct 30, 2003).)

Documents submitted by ACCU CHEM Conversion, Inc. at the December 15, 2008 hearing include a procedure dated July 24, 2008 and described as a transfer procedure for hydrochloric acid from a tank car to a cargo tank. Contained within that procedure is the following instruction after step six [6]:

“If the load is to be diluted, continue with step seven [7]. If the load is to remain at the strength in the tank car, skip step seven [7] and go directly to on to step seven [8].

### Conclusion for Material Transfer and Transloading

ACCU CHEM Conversion, Inc.’s own procedures indicate that the hydrochloric acid may be diluted in the transfer process. Because the material is altered in the transfer operation, the activity will not qualify as “transloading” which is regulated as a transportation activity.

The dilution of the material is sufficient to conclude that ACCU Chem Conversion, Inc.’s operation does not qualify as “transloading”. However, additional factors related to shipping papers, use of the railroad track storage and the attachment of motive power confirm that these operations do not fit within the definition of “transloading.”<sup>1</sup>

### III. Shipping Papers

1 ACCU CHEM Conversion, Inc. submitted approximately sixty (60) records regarding shipments  
2 of hydrogen chloride during the December 15, 2008 dispute resolution hearing. ACCU CHEM  
3 Conversion, Inc. stated that these documents did not include all shipments, but were  
4 representative of the site operations.  
5

6 As noted previously, the content of the shipping paper plays an important role in determining  
7 qualifications as a transloaded shipment.  
8

9 For example, a shipping paper prepared by the person offering a hazardous material for  
10 transportation in commerce may show the shipment destination as a transloading facility;  
11 provided that the shipping paper or other documentation includes information that the  
12 shipment is a through-shipment and identifies the final destination or destinations of the  
13 hazardous material, storage at the facility is "storage incidental to movement" and  
14 subject to regulation under the HMR. (70 Fed. Reg. 20020 (April 15, 2005).)

15 "The HMR do not require that a shipper use a special form. The HMR only require the proper  
16 information be placed on the shipping paper in the proper sequence. Shipping papers used to  
17 describe hazardous materials may be bills of lading, invoices, manifests, or just plain papers.  
18 They may or may not have specific columns to identify the hazardous material, but when used to  
19 ship a hazardous material, they must all meet the same requirements to describe the hazardous  
20 material using the information stated in the HMR." (US Department of Transportation, Pipeline  
21 and Hazardous Materials Safety Administration website, Dated December 1, 2006.)  
22

23 As part of the documentation submitted at the December 15, 2008 dispute resolution hearing,  
24 ACCU CHEM Conversion, Inc. supplied a document that contained the statement:  
25

"This document is not an official bill of lading. Official bills of lading are transmitted via  
EDI (Electronic Data Interchange) per DOT-E 7616."

1 The record retention requirement for bills of lading transmitted via EDI is described in the  
2 Eighteenth Revision to DOT SP-7616, United States Department of Transportation, Pipeline and  
3 Hazardous Materials Administration, dated October 18, 2005.

4  
5 "RECORD RETENTION: The offeror, the carrier, and any entity performing a function  
6 under the terms of this special permit, must maintain a copy of the shipping paper or  
7 transaction set transmitted for the hazardous materials  
8 shipment for a period of one year. Records may be retained using any available format  
(magnetic tape, paper retention, microfiche, etc.) and must be made available for  
inspection in a format readable by a representative of the Department  
upon request."

9 The document submitted by ACCU CHEM Conversion, Inc. appears to be the record of the  
10 shipping paper received via EDI. The remainder of the document set is comprised of bills of  
11 lading or weight tickets that described the movement of material from the ACCU CHEM  
12 Conversion, Inc. facility to another destination.

13  
14 A review of the set of documents presented by ACCU CHEM Conversion, Inc. show that on the  
15 unofficial document, the offeror lists ACCU CHEM as the customer rather than the agent. The  
16 other shipping papers or bill of lading documents appear to be shipping papers prepared by  
17 ACCU CHEM for a portion of the shipment which went from their facility to another  
18 destination. It appears ACCU CHEM is receiving the shipment as the customer from the offerer,  
19 off-loading a portion of the chemical into a cargo tank and then shipping it to their consignee  
20 under new shipping papers.

### 21 22 **Conclusion for Shipping Papers**

23 Whether the set of documents supplied are considered official or unofficial, the documents do  
24 not contain information that the shipment is a through shipment that identifies the final  
25

1 destination of the hazardous materials such that the activity could be considered storage  
2 incidental to movement and regulated under the HMR. These papers do not show that this  
3 activity is a transportation activity and thereby excluded from the definition of a stationary  
4 source.

#### 5 6 IV. ACCU CHEM FACILITY USE OF TRACK SIDING

7 At the December 15, 2008 dispute resolution hearing, the subject of the status of the track at the  
8 ACCU CHEM Conversion, Inc. facility was addressed. ACCU CHEM Conversion, Inc.  
9 conceded that they had exclusive use and control of the track siding located at the ACCU CHEM  
10 facility. The description provided included statements that ACCU CHEM had located at the  
11 facility the motive power means to move rail tank cars around the facility once they were  
12 delivered to the location.

13  
14 The exclusive use of the trackage was not presented as a matter of dispute, however the matter  
15 has bearing on whether the activity is regulated under the HMR as "storage incidental to  
16 movement". The relevance of track usage and "storage incidental to movement is discussed by  
17 the PHMSA in the October 30, 2003 Federal Register:

18  
19 "The concepts embodied by the term ``leased track" are often taken out of context. As  
20 currently set forth in Sec. 171.8 of the HMR, ``private track or private siding" is defined  
to mean:

21 Track located outside of a carrier's right-of-way, yard, or terminals where the carrier  
22 does not own the rails, ties, roadbed, or right-of-way and includes track or a portion of  
23 track which is devoted to the purpose of its user either by lease or written agreement,  
in which case the lease or written agreement is considered equivalent to ownership."

24 "The key term in the definition is ``Devoted to the purpose of its user," a phrase  
25 equivalent to the idea of ``exclusive use" or ``ownership." Either track is used by a  
railroad, or it is devoted to the exclusive use of another entity. The key to defining  
``private track" is not the existence of a lease or even a deed of title, but the devotion of

1 that track to the sole purpose of some person other than the railroad. Track may be leased  
2 for many purposes for the convenience of the lessee. Many of these leases do not exclude  
3 the railroad from using the track for its transportation purposes in addition to the lessee's  
4 purposes. Where the railroad has not ceded its care, custody, and control of the track to  
5 the lessee, such track remains railroad track and not private track. Where the lessee (in a  
6 transportation context, usually a shipper or receiver of rail cars) assumes the care,  
7 custody, and control of the track, the track is "devoted" to the purposes of its user and is  
8 private track. Rail cars containing hazardous materials that are stored on private track are  
9 not stored incidental to movement and are not subject to the HMR; rail cars containing  
10 hazardous materials that are stored on railroad track are stored incidental to movement  
11 and are subject to the HMR." "(68 Fed. Reg. 61921 (Oct 30, 2003).)

12 "As explained below, to avoid future misinterpretation, in this final rule we are amending  
13 the definition in Sec. 171.8 of "private track or private siding."

14 "As noted above, to conclude that a rail car is stored incidental to movement, we must  
15 determine whether the railroad carrier actually exercises ownership or control over the  
16 cars and trackage; the facial legal status of the cars and trackage, as expressed in a lease  
17 or written agreement between the parties, is not determinative. Private track may be  
18 located directly adjacent to a shipper or consignee facility or within a facility some  
19 distance from either the shipper or ultimate consignee. The lessee may have exclusive use  
20 of the leased track, or the track also may be used for movement of rail cars other than  
21 those of the shipper or consignee. Notwithstanding the terms of any written agreement  
22 between the lessee and the rail carrier, if the general system railroad controls the track,  
23 then the track is not "private" track for purposes of the HMR." "(68 Fed. Reg. 61919  
24 (Oct 30, 2003).)

## 25 CONCLUSION ON ACCU CHEM FACILITY USE OF TRACK SIDING

The exclusive use of the track siding by ACCU CHEM Conversion, Inc. means the track is not  
under the control of the general system railroad. As such, the rail cars stored on the track are not  
stored incidental to movement. They are therefore not regulated under the HMR.

## V. STORAGE INCIDENTAL TO MOVEMENT

ACCU CHEM Conversion, Inc. provided a document at the December 15, 2008 meeting with  
the title Pioneer Americas LLC, Transloading Agreement. The document recitals include:

1  
2 1) Pioneer shall have the right to store (Movement Incidental to Transportation)  
3 Hydrochloric Acid ("Product) on ACCU CHEM's property....ACCU CHEM agrees to  
4 receive, store and re-ship the product as Pioneer may require during the terms of this  
5 agreement.

6 2) Title of said Product should remain with Pioneer until sold.

7 The reasonable interpretation of these clauses is that Pioneer is the owner of product which is  
8 shipped to ACCU CHEM for storage on ACCU CHEM's property for disposition as Pioneer  
9 may determine either before or after the product is received at the ACCU CHEM location. The  
10 parties to the agreement wish to classify this activity as "movement incidental to transportation"  
11 as shown by the words in parenthesis.

#### 12 **Analysis of Storage Incidental to Movement**

13 The PHMSA modified the Code of Federal regulations, title 29, section 171.1(c) (4)(i) in the  
14 April 15, 2005 Federal Register as follows:

15  
16 (i) Storage incidental to movement includes--

17 (A) Storage at the destination shown on a shipping document, including storage at a  
18 transloading facility, provided the original shipping documentation identifies the  
19 shipment as a through-shipment and identifies the final destination or destinations of the  
20 hazardous material; and

21 (B) A rail car containing a hazardous material that is stored on track that does not meet  
22 the definition of "private track or siding" in Sec. 171.8, even if the car has been delivered  
23 to the destination shown on the shipping document.

24 (ii) Storage incidental to movement does not include storage of a hazardous material at  
25 its final destination as shown on a shipping document.

PHMSA explained that the shipping paper requirements AND the "private track or siding"  
requirements must be met. The word "and" functions as a conjunction meaning that both  
requirements must be fulfilled for the storage to be considered incidental to movement.

1  
2 As explained previously in this Decision, the shipping papers provided by ACCU CHEM do not  
3 show the shipments as a through shipment to Pioneer. In addition, the rail cars are stored on  
4 track that is under the exclusive use of ACCU CHEM.  
5

#### 6 **Conclusion on Storage Incidental to Movement**

7 The recitals in the document between Pioneer Americas LLC and ACCU CHEM may state a  
8 desire to have the activities engaged in be classified as “storage incidental to movement”,  
9 however, the facts presented do not show that their activities fall within this definition. The  
10 shipping papers do not show that the shipments are a through shipment to a final destination nor  
11 are the rail cars stored on track that is not private track. The evidence does not show that these  
12 activities are regulated under the HMR and excluded as a stationary source.  
13

#### 14 **CONCLUSION ON REGULATION AS A STATIONARY SOURCE**

15 A “stationary source” means any buildings, structures, equipment, installations, or substance  
16 emitting stationary activities which belong to the same industrial group, which are located on one  
17 or more contiguous properties, which are under the control of the same person (or persons under  
18 common control), and from which an accidental release may occur. The term stationary source  
19 does not apply to transportation, including storage incident to transportation, of any regulated  
20 substance or any other extremely hazardous substance under the provisions of this chapter. A  
21 stationary source includes transportation containers used for storage not incident to  
22 transportation and transportation containers connected to equipment at a stationary source for  
23 loading or unloading. (See Cal. Code Regs., tit. 19, § 2735.3, subsection (uu).)  
24  
25

1 In this case we are dealing with rail cars where each car contains about 128,000 pounds of 36.9%  
2 by weight hydrogen chloride with the remainder as water which equates to approximately 50,000  
3 pounds of hydrogen chloride. The material is routinely moved from the rail cars by transferring  
4 the materials to cargo tanks. Clearly there exists a potential for an accidental release to occur  
5 should there be damage to the rail car, the cargo tanks, or during the handling process, exactly  
6 the activity contemplated to be regulated under CAL-ARP.

7  
8 Factors were examined that would include this activity as a transportation operation and exclude  
9 this operation from inclusion as a stationary source. The activity does not qualify as transloading  
10 because the activity is not the minimal risk operation associated with the transfer of a pure  
11 material, but based upon information submitted by the petitioning party, has a blending, mixing  
12 or altering of the pure material contained in the operating procedures. The petitioning party has  
13 not sustained the burden of showing that locating the rail cars on the property is storage  
14 incidental to movement in commerce by producing shipping papers that show the rail cars are a  
15 through shipment to a final destination while stored on trackage that is not under the exclusive  
16 use of the petitioning party. The written transloading agreement submitted by the petitioning  
17 party by itself is insufficient to show that the activity engaged in constitutes "transloading." The  
18 facts do not show that the shipping paper requirements and track usage requirements have been  
19 met. The petitioner has not shown that their activity is a transportation function regulated under  
20 the HMR and excluded as a stationary source.

21  
22 Based upon the fact that the storage and handling of 36.9% by weight hydrogen chloride cannot  
23 be excluded from classification as a stationary source as a transportation activity, the hearing  
24 officer finds the operation regulated under the CAL-ARP regulations.

1  
2  
3 DATED: March 9, 2009

by:

Roger Vintze  
Roger Vintze  
Hearing Officer

4  
5 FOOTNOTES:

6  
7 <sup>1</sup> While not necessary to examine as part of this decision, EPA considers a container to be in  
8 transportation as long as it is attached to the motive power that delivered it to the site (e.g., a  
9 truck or locomotive). If a container remains attached to the motive power that delivered it to the  
10 site, even if a facility accepts delivery, it would be in transportation, and the contents would not  
11 be subject to threshold determination. As stated earlier, EPA will continue to work with DOT to  
12 avoid regulatory confusion. (63 Fed. Reg. 643 (Jan 6, 1998).)

13 Here, the rail cars are delivered to the petitioner's property and the motive power is removed.  
14 The cars are moved on the petitioner's property by petitioner using their own equipment.  
15 However, since 1998, it has become clear that the removal of motive power is but one indicia of  
16 whether a container is not in transportation.  
17  
18  
19  
20  
21  
22  
23  
24  
25

ATTACHMENT A

LISTING OF DOCUMENTS SUBMITTED BY ACCU CHEM CONVERSION, INC.

DOC  
NUM.      TITLE

1. PHMSA Interpretation Letter #05-0313, dated 2/27/06
2. PHMSA Interpretation Letter #07-0136, dated 9/24/07
3. "All technical information regarding the actual transload system that we use"  
This includes explanation, schematics, drawings, and SOP's in use at ACCU  
CHEM.
4. Appendix A 40 CFR Part 68
5. "Chapter 1: General Applicability" guidance document for 40 CFR part 68
6. October 30, 2003 Federal Register
7. "Transloading Versus Repackaging"
  - a. guidance document with definitions from unknown source
  - b. Transloading Agreement between Pioneer Americas LLC and ACCU  
CHEM
8. Serko & Simon LLP bulletin, dated May 2005
9. US DOT frequently asked questions guidance document
10. Representative sample of shipping papers and weight certificates for rail tank  
cars and cargo tanks entering and exiting ACCU CHEM facility during the year  
2008